

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 58432-S43A BY LESTER AND)
ANNABELLE M. FREDERICK)

FINAL ORDER

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. No timely exceptions were received from any party of record. The Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as set forth in the October 17, 1986 Proposal for Decision, and incorporates them herein by reference. Based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:


ORDER


Application for Beneficial Water Use Permit NO. 58432-s43A by Lester and Annabelle Frederick hereby is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 17th day of November, 1986.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605


Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CASE # 58432

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 14, 1986, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department on the Application by Lester & Annabelle M. Frederick, Application No. 58432-s43A, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Lester & Annabelle M. Frederick, Box 165, Clyde Park, MT 59018
2. Warren P. & Jaime M. Latvala, Box 197, Clyde Park, MT 59018
3. Scott Compton, Manager, Water Rights Bureau Field Office, Bozeman, MT 59715 (inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14th day of November, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Sam P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 58432

Bless

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 58432-S43A BY LESTER AND)
ANNABELLE M. FREDERICK)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held on February 21, 1986, in Clyde Park, Montana.

Lester and Annabelle Frederick, the Applicants in this matter, appeared in person at the hearing.

Objectors Warren and Jaime Latvala appeared by and through Warren Latvala.

Harry Livingston and E.F. (Ernie) Queen, residents of the area, attended the hearing and were called upon by both parties to testify.

Jan Mack, New Appropriations Supervisor for the Bozeman Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

CASE # 58432

STATEMENT OF THE CASE

On April 29, 1985, the Applicants filed an Application for Beneficial Water Use Permit, seeking to appropriate 841.5 gallons per minute (75 miner's inches) up to 99 acre-feet of water per year from the East Fork of Spring Creek for flood irrigation of 30 acres of land. The proposed point of diversion is the N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, Township 02 North, Range 09 East, Park County, Montana, with the water to be diverted by means of a headgate and ditch to the proposed place of use in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2, Township 01 North, Range 09 East, Park County, Montana. The requested period of appropriation is April 1 to June 15, and September 15 to November 15, of each year.

The pertinent portions of the Application were published in the Livingston Enterprise, a newspaper of general circulation in the area of the source, on May 29 and June 5, 1985.

A timely objection was filed to Application No. 58432-s43A by Warren and Jaime Latvala, alleging that there is no unappropriated water in either fork of Spring Creek and that, since more people upstream are using sprinklers instead of flood irrigating, the Objectors very seldom receive their 150 miner's inches (MI) of decreed water, let alone their additional 150 MI of "early" water.

Jan Mack, of the Bozeman Water Rights Bureau Field Office, field investigated the Application on August 22, 1985, and prepared a report (dated August 30, 1985).

EXHIBITS

The Applicants did not submit any exhibits in support of their Application in this matter.

The Objectors did not submit any exhibits in support of their objections to the Application in this matter.

The Department offered seven exhibits for inclusion in the record in this matter, in addition to the August 30, 1985 Field Report prepared by Jan Mack and submitted to the parties and to the Department for inclusion in the contested case file in this matter:

Department Exhibit 1 is a photocopy of a U.S. Department of Agriculture aerial photograph showing the East Fork of Spring Creek and surrounding area. The Applicants' proposed place of use is marked in green, and the existing ditch that the Applicants propose to use is marked in orange.

Department Exhibit 2 is a photocopy of a U.S. Department of Agriculture aerial photograph showing the East Fork of Spring Creek and surrounding area. The Latvala property is outlined in red, and the ditches from which the Latvalas divert water are marked in purple.

Department Exhibit 2A is a photocopy of a U.S. Department of Agriculture aerial photograph of the East Fork of Spring Creek and surrounding area. The East and West Forks of Spring Creek are marked in blue, and the Applicants' proposed place of use is marked in green, the ditches the Applicant proposes to use are

marked in red, the Latvala ditches are marked in orange, a ditch carrying Cottonwood Creek water to the Latvala Property is marked in yellow, and the points of diversion for the Applicants and the Objectors are identified.

Department Exhibit 3 consists of photocopies of the Statements of Claim for Existing Water Rights filed by Warren and Jaime Latvala (Nos. 018884, 018885, 018886, 018887, 191054, 191055, 019227, 019228, 019229, and 022508). The Statements of Claim are for irrigation and stockwater: Claims 018885, 018886, and 018887 claim water from Cottonwood Creek, Claim 022508 claims water from an unnamed spring while the remaining six Claims list Spring Creek as the source of water.

Department Exhibit 4 consists of photocopies of a computer printout of the Latvala Statements of Claims for Existing Water Rights, listed by owner name.

Department Exhibit 5 is a photocopy of Statement of Claim for Existing Water Rights No. 110452, filed by Queen Ranches, Inc., and listing the East Fork of Spring Creek as the source. The Statements claims 150 MI up to 500 acre-feet per year for irrigation purposes.

Department Exhibit 6 consists of four photographs taken by Jan Mack on August 22, 1985. The photographs show Spring Creek running under a county road in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 03, Township 01 North, Range 09 East (two photographs); the Latvala point of diversion, and the Applicants' proposed point of diversion.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Application in this matter was duly filed with the Department of Natural Resources and Conservation on April 29, 1985 at 3:17 p.m.

3. The pertinent portions of the Application were published in the Livingston Enterprise, a newspaper of general circulation in the area of the source, on May 29 and June 5, 1985.

4. The source of the proposed appropriation is the East Fork of Spring Creek, a tributary of the Shields River, in Park County, Montana.

5. The Applicants want to divert water from the East Fork of Spring Creek through an existing ditch located north of the creek. The ditch served the Applicants' property before the water right was transferred to other property. (Testimony of Lester Frederick.) The Field Report states that "no construction would be needed" for the Applicants to be able to use the ditch (August 30, 1985 Field Report, page 1); however, the Applicant testified that he has a headgate structure which he would install at the point where the ditch diverts water from the East Fork.

The requested flow rate is based on the capacity of the ditch that the Applicants propose to use. (Testimony of Lester Frederick.)

6. Lester Frederick (hereafter referred to in the singular as "the Applicant" when referring to testimony given at the hearing in the matter), testified that he wants to flood irrigate his hay field, and also flood irrigate the remainder of his 30 acres for grass for pasture. He stated that he does not have any idea what the crop requirements are for the area.

7. The Applicants have applied for a period of appropriation from April 1 to June 15, and from September 15 to November 15, of each year. The Applicant testified that the period of June 15 through September 15 was excluded on the Application because water in the East Fork of Spring Creek is fully appropriated during this time.

The Applicant stated that he wants to use water before and after the "other ditches" operate; that he would use water early in the spring, then late in the fall when Latvalas' ditch is turned off. The Applicant testified that he would turn his ditch off when Latvalas divert through their ditch. He testified that he would shut off water when it starts to freeze up.

In response to a question, the Applicant stated that the Applicants' proposed point of diversion on the East Fork of Spring Creek is upstream from points of diversion for senior appropriators Warren and Jaime Latvala, and Ernie Queen.

8. The Applicant did not provide any evidence as to specific flow rates of the East Fork of Spring Creek during his proposed period of appropriation. He did state that there is a "pretty good flow" in the early spring during runoff, and that the creek never runs dry. He also stated that there is a "lot of water" in the creek in the fall until it freezes. The Applicant testified that there are "a lot of springs" which provide water to the creek, and that the creek never runs dry.

9. The only flow measurements of the East Fork of Spring Creek available in this matter are a flow measurement taken on August 22, 1985 at the county road below the juncture of the East Fork and West Fork of Spring Creek (see August 30, 1985 Field Report and Department Exhibit 6), and a flow measurement taken at the county road above the Applicants' and Objectors' points of diversion at the site visit which immediately preceded the hearing in this matter on February 21, 1986.

The August 30, 1985 flow measurement (taken at the culvert on the county road which runs north-south between Sections 02 and 03, Township 01 North, Range 09 East) shows a combined East Fork and West Fork flow of approximately 9 cfs. Based on estimates of the percentage of flow which the East Fork was contributing, Jan Mack estimated the flow of the East Fork of Spring Creek to be "perhaps up to . . . 6 cfs." (See August 30, 1985 Field Report, page 2.) This measurement was taken at a time when the Applicant was diverting an unknown quantity of water, but the Latvalas were not diverting water from the stream. (See Field Report.) It is not known how many, if any, upstream appropriators were diverting water at this time, or in what amounts.

The February 21, 1986 flow measurement, taken with a bucket and stopwatch at a point above the Applicants and Objectors (at the culvert on the county road which runs east-west between Sections 25 and 36, Township 02 North, Range 09 East) showed a flow of about 35 gpm in the East Fork of Spring Creek. (Site visit by Hearing Examiner and parties, testimony of Jan Mack.)

10. Objector Warren Latvala testified that he does not believe the Applicant would obey any permit restrictions or conditions which might be imposed. Mr. Latvala made several allegations dealing with past instances of conflict between himself and the Applicant over water, the general substance of the allegations being that the Applicant in the past has taken water to which he was not entitled, by various means and at various times. Mr. Latvala stated that he will be adversely affected if any permit is issued to the Applicant because the Applicant is likely to divert water which the Latvalas need, and because he will be faced with the necessity of constantly checking the Applicants' diversion headgate and ditch (in a location which the Objector alleges is difficult to reach) to ensure that the Applicant is complying with the permit times, amounts, and conditions.

11. Mr. Latvala further alleged that, even if the Applicants' cooperation and compliance were not a problem, there is not any water available for appropriation by the Applicant.

Mr. Latvala testified that the only time there is enough water in the East Fork of Spring Creek that he can irrigate is after irrigators above him have begun irrigating and waste and

runoff waters from such irrigation have incremented the flow of the creek; the only time he can get his full 150 miner's inches of decreed water rights is when such stream conditions occur simultaneously with a period of rain. Mr. Latvala stated that he almost never gets his full right; that the flow in the creek has been less since irrigators above him have changed to sprinkler irrigation and thereby reduced the amount of waste and runoff in the creek.

12. Mr. Latvala stated that there is no more water in the creek in the spring (pre-irrigation season) than there was at the time of the site visit prior to the hearing (see Finding of Fact 9), and that not much water is left in the creek in the fall when irrigation is over. He stated that sometimes in the fall there is not enough water for stockwater.

Mr. Latvala testified that the only time there is much water in the East Fork of Young Creek is during irrigation season, and that even during irrigation season it is necessary to try coordinating periods of use with Ernie Queen. He stated that he does not believe there is much increment to the stream flow between the Applicants' point of diversion and his own, such that any diversion by the Applicant could be replaced by spring flow for use by the Latvalas.

13. Mr. Latvala testified that he uses water for irrigation whenever it is available, beginning irrigation as early as possible (citing March as a possible beginning date, which the Applicant disputes) and continuing as late as water is available

in the fall to keep the fields moist and provide pasture. He testified that he uses the available water at all times, except for brief periods when he is haying.

Mr. Latvala stated that he also uses water from the East Fork of Spring Creek for stockwater. He stated that he turns water into ditches and runs it for stockwater all winter, if possible, or until the winter becomes severe enough that the water freezes. He testified that he shuts the water off if there isn't enough flow to keep the ditch open.

14. Warren and Jaime Latvala have filed four Statements of Claim for Existing Water Rights which claim Spring Creek water for irrigation purposes. (Claims No. 019228, 019229, 191054, and 191055.) Claim No. 019229 claims a decreed right with a priority date of 1885, Claim No. 191054 claims a use right with a priority date of 1855, Claim No. 019228 claims a decreed right with a 1903 priority date, and Claim No. 191055 claims a use right with a 1903 priority date.

Each claim lists both the East Fork and the West Fork of Spring Creek as points of diversion, and each claims a flow rate of 75 MI (up to a volume of 800 acre-feet on each of the decreed rights, and a volume of 450 acre-feet on each of the use rights). There is no indication in the documents or in Mr. Latvala's testimony as to whether the claimed irrigation rights on the East Fork and the West Fork are to be used simultaneously, or alternatively. However, Mr. Latvala did refer to using 150 MI of water rights on the East Fork of Spring Creek.

The two claimed decree rights list a period of appropriation of March 1 through October 1 of each year, while the claimed use rights list an appropriation period of March 1 through July 1 of each year. When questioned about the latter cutoff dates, Mr. Latvala stated that they actually use the water much longer than is claimed.

The Latvalas also have filed two Statements of Claim for stockwater from Spring Creek. Claim No. 018884 specifies Spring Creek as the source of water, claiming a flow rate of 20 MI up to 1,800 gallons per day for instream stock use. The period of diversion shown for this claim is January 1 through December 31 of each year. Claim No. 019227 lists points on both the East Fork and West Fork of Spring Creek as the point of diversion, and claims a flow rate of 40 MI up to 6,180 gallons per day for stock use from a ditch. This stockwater claim lists an October 1 through March 1 period of diversion.

15. Harry Livingston, who lives at the head of East Fork of Spring Creek (testimony of the Applicant, Mr. Livingston), attended the hearing and was asked by both parties to testify as to his personal knowledge of flow conditions in the East Fork of Spring Creek.

Mr. Livingston testified that, in his personal experience, the late winter-early spring period was the low point of the year for flow, while late spring-early summer has the peak flows. He stated that the flow in the springs on the creek picks up in March and April. Mr. Livingston testified that the 30" diameter culvert in his corral runs full when people are irrigating above

him, and then has about 8" of water in October. He added that in the fall if the Gilberts are flood-irrigating there's a "lot of water." Mr. Livingston stated that water levels during the irrigation season depend on "who is irrigating, and how much."

Mr. Livingston stated that he doesn't have any idea how much water is in the creek down in the area of the Applicant and the Objectors.

16. E.F. (Ernie) Queen attended the hearing and was asked by the parties to testify as to his personal knowledge of flow conditions in the East Fork of Spring Creek. Mr. Queen testified that he has an East Fork diversion out of the same ditch which is used by the Latvalas, and another East Fork diversion "a couple of hundred yards" above that point of diversion, on the other side of the creek.

Mr. Queen stated that there always seems to be water in the creek; that he has never seen the East Fork of Spring Creek without water in it, although there is not always a flow upon which he can depend. He stated that his water right probably is not satisfied in April, when irrigation has not started, and especially since many water users have gone from flood to sprinkler irrigation. He also stated that he has not been able to exercise his claimed additional use rights the last few years, due to the changed irrigation practices.

Mr. Queen testified that he does not usually have East Fork water after August unless it is from a water trade with the Latvalas. He stated that he could not say that water wouldn't be

available during the Applicants' proposed fall period of appropriation, but that it probably would not be if the Latvalas are using water.

In response to a question concerning what kind of flows are present after September 15 at the headgate for the ditch he shares with the Latvalas, Mr. Queen estimated that there is usually about 100 MI unless someone upstream is flood irrigating. He stated that the flow at the ditch gets down to about 30 MI during the winter.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and

- (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The Applicant has a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 p. 575 (1912).

5. The use proposed by the Applicant, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985); Sayre v. Johnson, 33 Mont. 15, 18 p. 389 (1905).

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 5.)

8. The record in this matter does not provide substantial credible evidence indicating that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, or that throughout the period during which the Applicant seeks to appropriate, the amount requested is available. See MCA § 85-2-311 criteria, above.

CASE # 58432

There is very little information available in this record concerning the availability of water in the East Fork of Spring Creek, apart from general, non-specific statements made by the parties. As may be expected, the Applicant asserts that there is plenty of water available for his proposed use during the requested periods of appropriation (see Finding of Fact 8), while the Objector equally vehemently asserts a shortage of water in such quantities at such times (see Findings of Fact 11 and 12).

The only actual flow data available consists of a flow measurement taken in February, a time which is irrelevant for purposes of this matter except for use as a comparison (see Finding of Fact 12), and a flow measurement taken at a time when the Objector was not exercising his water rights nor is it known whether upstream appropriators were exercising their water rights. (See Finding of Fact 9, August 30, 1985 Field Report.) This (August) flow measurement also was taken during a period of time not included in the Applicants' requested period of appropriation.

Warren Latvala testified that he begins irrigating as soon as he is able to get sufficient water. Whether or not he begins, or ever has begun, irrigating as early as March 1 is a point upon which the parties disagree, but which is irrelevant to this matter since the Applicant has not requested a permit for this time.

The limited evidence suggests that the flow in the East Fork of Spring Creek is insufficient to meet the needs of senior appropriators in early April (see Findings of Fact 11, 15 and 16), when the Applicant wishes to begin irrigating, and that once the flow has increased, it is fully utilized for irrigation (see Findings of Fact 11, 12 and 16). This evidence contradicts the Applicant's assertion that he could utilize water prior to the time other irrigators begin their operations. In addition, there is no evidence to indicate that the flow of the East Fork is not fully utilized once irrigation begins; in fact, the Objector testified that he rarely is able to obtain his full water right. (See also Finding of Fact 16.)

9. With regard to the requested fall period of appropriation, from September 15 through November 15, there also is insufficient evidence in the record to constitute substantial credible evidence on the issue of water availability.

Although Mr. Latvala testified that the Objectors use their claimed use rights much later than the July 1 cutoff date which is specified in their Statement of Claims for Existing Water Rights Nos. 191054 and 191055, the claims constitute prima facie proof of their content until the issuance of a final decree in the adjudication process (see MCA § 85-2-227). This places Mr. Latvala in the position of attempting to rebut his own claim. The Hearing Examiner declines to accept Mr. Latvala's verbal, unsubstantiated revision of his claims, in the absence of a decision by the Water Court that such amendment will be accepted and adopted in the adjudication decree.

With this proviso, however, the Latvalas have two decreed irrigation rights (Claims No. 19228 and 19229) each for 75 MI, which extend through October 1 of each year. They also have a year-round claimed stockwater use (Claim No. 18884) for 20 MI, as well as a claimed stockwater use (Claim No. 18885) for 40 MI, as well as a claimed stockwater use of 40 MI beginning on October 1 and running through March 1 (Claim No. 19227).

Even assuming arguendo, because the record is unclear (see Finding of Fact 14), that the Latvalas are only utilizing one 75 MI right out of the East Fork of Spring Creek, they still are using a minimum of 95 MI until October 1 with a possibility of utilizing as much as 170 MI; after October 1, they have a stockwater use up to 60 MI

The limited flow information indicates that the flows in the East Fork of spring Creek range anywhere from a maximum of about 6 cfs (240 MI) in August (see Finding of Fact 9) to about 2.50 cfs (100 MI) in September, and then decrease in the winter. (See Findings of Fact 12 and 16.) A comparison of the possible flow rates with the Latvalas' claimed water uses indicates the likelihood that little, if any, water is available for appropriation unless upstream irrigators are flood-irrigating. This corresponds with the testimony given by Harry Livingston and Ernie Queen. (See Findings of Fact 15 and 16.)

Since the Applicant failed to provide any evidence concerning the frequency, duration, and quantity of any periods of increased flow, and since the parties and witnesses were all in agreement that such heightened flows had decreased since

unnamed appropriators had changed from flood to sprinkler irrigation, it is not possible to grant the Applicant a permit based on the uncertain chance that higher flows will occur.

(See also Conclusion of Law 10, below.)

In summary, there may be periods of time when water is available for appropriation. However, the Applicant has failed to provide substantial credible evidence on this issue.

Unsubstantiated testimony by the Applicant cannot suffice to meet the Applicants' burden of proof in such matters, at least where that testimony has been contradicted by other testimony or evidence: in such circumstances, the Applicant must provide further evidence in the form of flow data, photographs, witnesses, or other means by which the statutory criteria can be shown to have been met.

10. The Applicant has failed to provide substantial credible evidence that his proposed appropriation would not adversely affect the water rights of a prior appropriator.

The Applicant testified that he would limit his times of appropriation to those times when the Objectors' ditch is shut off. However, even setting aside the Objectors' allegations concerning the Applicants' bad faith and lack of cooperation, the Applicant has failed to show how such a situation would be workable.

Since the Applicants' proposed point of diversion is upstream from the Objectors' ditch, the Applicant has no way of knowing if and when the Objectors are diverting water; at least, the Applicant did not proffer any method of making this

determination. If the parties were required to rely on the priority system--that is, if the Applicant diverted water subject to the Objectors' right to call upon him to shut down whenever they needed the water--the record in this matter indicates that the Objectors would be forced to make continual calls, since they are utilizing whatever water is available in the East Fork of Spring Creek nearly all the time; an undue burden which might adversely affect the Objectors, especially since some lag time would necessarily elapse between their call and resumed flow at their ditch.

It is possible that there might be a means by which any adverse affect to the Objectors could be mitigated or avoided. However, as with the issue of water availability, the Applicant has failed to provide substantial credible evidence that the criterion is met.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 58432-s43A by Lester and Annabelle Frederick hereby is denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

CASE # 58432

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 17th day of October, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CASE # 58432

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 17, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an order by the Department on the Application by Lester & Annabelle M. Frederick, Application No. 58432-s43A, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Lester & Annabelle M. Frederick, Box 165, Clyde Park, MT 59018
2. Warren P. & Jaime M. Latvala, Box 197, Clyde Park, MT 59018
3. Scott Compton, Manager, Water Rights Bureau Field Office, Bozeman, MT 59715 (inter-departmental mail)
4. Gary Fritz, Administrator, Water Resources Division, (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 17th day of October, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T. L. Reynolds
Notary Public for the State of Montana
Residing at _____, Montana
My Commission expires _____

NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My Commission Expires July 23, 1989

CASE # 68432